

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.86 of 2003

1. (a) Shyam Sunder, S/o Anand Ram and Late Dulara Bai, aged about 42 years,

(b) Ramakant, S/o Anand Ram and late Dulara Bai, aged about 33 years,

Both R/o Village Mungadeeh, P.S. Pali, P.O. Baksahi, Civil & Revenue District Korba (C.G.)

(c) Smt. Shyam Bai, W/o Ram Narayan, D/o Anand Ram & Smt. Dulara Bai, aged about 40 years,

(d) Smt. Rama Bai, W/o Santosh Kumar, D/o Anand Ram & Smt. Dulaara Bai, aged about 36 years,

Both R/o Village Katghora, P.S. & P.O. Katghora, Civil & Revenue District Korba (C.G.)

2. Ram Kunwar Bai, aged about 40 years, in 1999, 44 years (at present), D/o Late Shree Ramlal. Kalar by caste, R/o Vill. Mungadeeh, Tah. Katghora, Distt. Bilaspur, present Distt. Korba (C.G.)

(Plaintiffs)
(Respondents in first appeal)
---- Appellants

Versus

1. Narayan Prasad, age 44 years, in 1999, 48 years (at present), S/o late Shree Ramadhar,

2. Ram Kumar, aged about 39 years, in 1999, 43 years, (at present), S/o late Shree Ramadhar

Both Kalar by caste and R/o Village Mungadeeh, Tah. Katghora, Distt. Bilaspur, present Distt. Korba (C.G.)

3. State of Chhattisgarh, through Collector, Distt. Korba (C.G.)
(Defendants)
(Appellants in first appeal)
---- Respondents

For Appellants: Mr. R.N. Jha, Advocate.

For Respondents No.1 and 2: -

Mr. Prafull N. Bharat and Mr. Akash Pandey, Advocates.

For Respondent No.3 / State: -

Mr. Adhiraj Surana, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

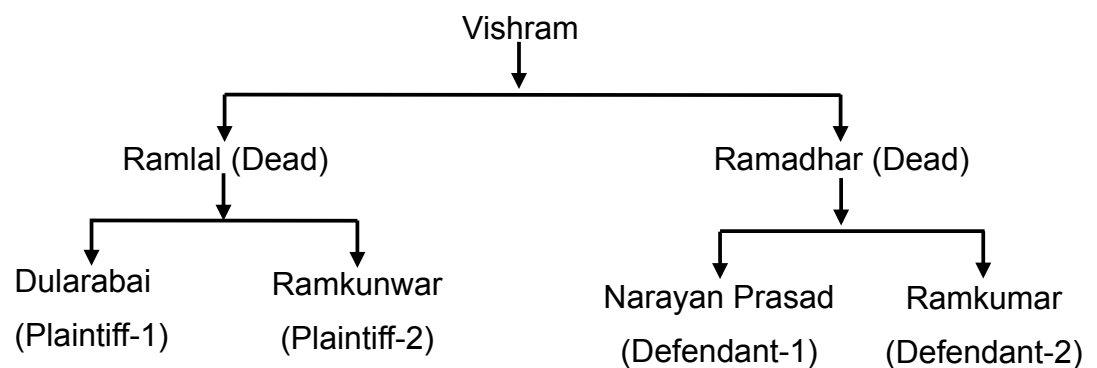
Judgment On Board

13/12/2018

1. The substantial question of law involved, formulated and to be answered in the plaintiffs' second appeal is as under: -

“Whether the First Appellate Court was justified in reversing the findings recorded by the trial Court on issue Nos.6 & 7 with regard to validity of will?”

2. The following genealogical tree will demonstrate the relationship among the parties:-



3. The suit property was originally held by Vishram. He died leaving behind his two sons Ramlal and Ramadhar. The plaintiffs are daughters of Ramlal, whereas the defendants are sons of Ramadhar. Ramadhar predeceased Ramlal and names of defendants No.1 & 2 came to be recorded in the lands owned by their father. It is the case of the plaintiffs that after death of Ramlal, they being the daughters have become title holders of the suit land came in possession of the suit land. They made a request to the Patwari for mutation in their names which was turned down, as the Additional Tahsildar, Pali by order dated 8-12-1994 on the strength of Will dated 15-5-1992 allegedly executed by Ramlal – plaintiffs'

father in favour of defendants No.1 & 2, mutated their names leading to filing of suit stating inter alia that at the time of Will, deceased Ramlal was not of sound and disposing mind and he was suffering from kidney disease and taking benefit of his ill-health, the defendants got the Will executed in their names as such, the plaintiffs are entitled for half share in the total suit property and the defendants be restrained from interfering with their possession.

4. Defendants No.1 & 2 filed their joint written statement stating inter alia that Ramlal during his lifetime on 15-5-1992 executed a Will in their favour bequeathing his interest in the suit property and got it registered in the office of the Sub-Registrar, Bilaspur and on the basis of said Will, their names were recorded in the land records and they are in possession. It was further pleaded that mother of the plaintiffs had left Ramlal all alone and got married with some other person and plaintiff No.2 was also residing with the second husband of Motim Bai and thereafter, Ramlal married the mother of defendants No.1 & 2 who had served Ramlal till his death and thus, he was having love and affection towards them. It was also pleaded that the Will was executed on 15-5-1992, whereas the suit was filed on 10-5-1995 as such, the suit is barred by limitation.
5. The trial Court after appreciating oral and documentary evidence on record, came to the conclusion that the plaintiffs are having interest and title over the suit land and Ramlal was not empowered to execute the Will in favour of defendants No.1 & 2 and execution and attestation of Will is also not established in accordance with Section 63(c) of the Succession Act, 1925 and thereby decreed the

suit which was reversed by the first appellate Court holding that execution and attestation of will is duly established in accordance with law leading to filing of second appeal in which substantial question of law has been framed and which has been set-out in the opening paragraph of the judgment

6. Mr. R.N. Jha, learned counsel appearing for the appellants / plaintiffs, would submit that the first appellate Court is absolutely unjustified in reversing the finding recorded by the trial Court on issues No.6 & 7 which leads to competence of Ramlal to execute a Will in favour of defendants No.1 & 2 who are nephews of Ramlal and the Will was not established in accordance with Section 63(c) of Succession Act, 1925. It is quite unnatural that a father will exclude his daughters from the line of succession, as the plaintiffs were having cordial relation with Ramlal. The Will suffers from several suspicious circumstances, as defendants No.1 & 2 being prepounders of the Will, have actively participated in the execution of Will and did not clarify their position while leading evidence as such, judgment & decree of the first appellate Court deserves to be set aside and that of the trial Court deserves to be restored with cost(s).
7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.
8. The short question for consideration is, whether the Will Ex.P-1 has been proved and established by defendants No.1 & 2 in view of the provisions contained in Section 63 of the Succession Act, 1925

read with Section 68 of the Evidence Act, 1872?

9. It is trite law that a will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer *res integra*, that it carries with it an overwhelming element of sanctity. [See Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and others¹]

10. In order to consider the plea raised at the bar, it would be appropriate to notice Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872.

11. Section 63 of the Act of 1925 provides as under:-

“63. Execution of unprivileged Wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

1 (2015) 8 SCC 615

12. As per the provisions of Section 63 of the Succession Act, 1925 for due execution of a will (1) the testator should sign or affix his mark to the will; (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will; (3) the will should be attested by two or more witnesses; and (4) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.

13. The above-stated provision of attestation of will under Section 63(c) of the Succession Act, 1925 by two or more witnesses has been held to be mandatory by Their Lordships of the Supreme Court in the matter of Janki Narayan Bhoir v. Narayan Namdeo Kadam².

14. Section 68 of the Evidence Act, 1872 provides as under:-

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

15. By the aforesaid provision, a document required by law to be attested to have its execution proved by at least one of the attesting witnesses if alive and it is subject to process of the court conducting the proceedings involved and is capable of giving evidence.

² (2003) 2 SCC 91

However, proviso to Section 68 of the Evidence Act, 1872 is not available in case of will.

16. In the matter of Girja Datt Singh v. Gangotri Datt Singh³, Their Lordships of the Supreme Court have held that in order to prove the due attestation of will, the propounder of will has to prove that 'A' and 'B', the two witnesses saw the testator sign the will and they themselves signed the same in the presence of the testator. Their Lordships while considering Section 68 of the Evidence Act, 1872 further held that from the mere signature of two persons appearing at the foot of the endorsement of registration of will it cannot be presumed that they had appended their signature to the document as an attesting witness or can be construed to have done so in their capacity as attesting witness. It was pertinently observed as under:-

“In order to prove the due attestation of the will Ex. A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be witnesses who had no regard for truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves.”

“One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as

3 AIR 1955 SC 346

attesting witnesses. Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri.”

17. In the matter of H. Venkatchala Iyengar v. B. N. Thimmajamma and others⁴ the Supreme Court speaking through Gajendragadkar, J., elaborately laid down the principles relating to the nature and standard of evidence required to prove a will. It was held as under:-

“(1) Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

(2) Since [Section 63](#) of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by [Section 63](#) of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

(3) Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

(4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the

4 AIR 1959 SC 443

signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

(5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

(6) If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

18. The principle laid down in the above-stated judgment has been followed with approval in Smt. Jaswant Kaur v. Smt Amrit Kaur and others⁵, Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another⁶, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others⁷ and Jagdish Chandra Sharma (supra).

19. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal

5 (1977) 1 SCC 369

6 (1974) 2 SCC 600

7 (2009) 4 SCC 780

Representatives and another⁸, the Supreme Court has again reiterated the need of proving the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

20. In **Surendra Pal** (supra), the Supreme Court while re-stating the guidelines regarding the nature and extent of burden of proof on the propounder of a will held that propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind; that he understood the nature and effect of the dispositions; that he put his signature to the testament of his own free will; and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. It was further held that in cases where the propounder has himself taken a prominent part in execution of a will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence.

21. The Supreme Court in **Yumnam Ongbi Tampha Ibema Devi** (supra) has clearly held that the attestation of will is not an empty formality. Highlighting the importance of attestation it was held it means signing a document for the purpose of testifying of the signatures of the executant. The attesting witness should put his signature on the will *animo attestandi* and it was held as under:-

“13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession

8 (2017) 1 SCC 257

Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator."

22. In Janki Narayan Bhoir (supra), the Supreme Court while considering Section 63(c) of Succession Act, 1925 and Section 68 of the Evidence Act, 1872 held that mere proof of signature of the testator on the will was not sufficient, the attestation thereof is also to be proved as required by Section 63(c) of the Act Succession Act, 1925. It was observed as under: -

"10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63 although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68

gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attention of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attention of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the *execution of the will* does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”

23. The principle of law laid down in Janki Narayan Bhoir (supra) has been followed with approval in Jagdish Chandra Sharma (supra) by which it was held as under:-

“52. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of Act 1872 vis-à-vis a document required by law to be compulsorily attested, it was held Janki Narayan Bhoir (supra) that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the Court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the Will was not sufficient and that attestation thereof was also to be proved as required by Section 63 (c) of the Act. It was,

however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a Will, in terms of Section 63 (c) of the Act, viz., attestation by two attesting witnesses in the manner as contemplated therein. It was expounded that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the Will by the other witness, his testimony would fall short of attestation of the Will by at least two witnesses for the simple reason that the execution of the Will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required Under Section 63 of the Act. It was held that where the attesting witness examined to prove the Will Under Section 68 of 1872 Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects.”

24. Reverting to the facts of the present case in light of the principle of law rendered by Their Lordships of the Supreme Court in the above-noted judgments (supra) qua execution and attestation of Will by a testator, the following factual position would emerge on the face of record: -

1. Testator Ramlal executed the Will in respect of his properties – land having area of 2.50 decimals (joint with Ramadhar) in favour of defendants No.1 & 2 – his nephews excluding his two daughters i.e. the plaintiffs herein namely Dulara Bai & Ramkunwar on 15-5-1992 and got it registered in the office of the Sub-Registrar, Bilaspur.
2. The Will is said to have been attested by two witnesses Ambika Prasad (DW-2) & Basant Lal (DW-3) and Narayan Prasad (DW-1) and Ramkumar – propounders of the Will were also present at the time of execution of Will.

3. The Will – Ex.P-1 states that the plaintiffs had no issue, whereas plaintiff No.1 – Dulara Bai had two sons namely, Shyam Sunder & Ramakant and two daughters namely, Shyam Bai & Rama Bai who have been substituted as legal representatives of Dulara Bai in the second appeal before this Court.
 4. The testator of the Will immediately after executing the Will on 15-5-1992, executed a sale deed in favour of Anand Ram vide Ex.P-2, along with the defendants and sold 1 acre of land on 18-5-1992 / 26-5-1992 in which age of Ramlal was stated to be 65 years, whereas in Ex.P-1, it was stated to be 75 years.
 5. Ambika Prasad (DW-2) – one of the attesting witnesses has stated that at the instance of Ramlal – testator, the document writer has typed the Will and thereafter, he has signed the will in 'A' to 'A' portion, Basant Lal (DW-3) signed in 'B' to 'B' portion and Ramlal has affixed his mark over the Will and he was not ill and was in a good and sound condition of health. Ambika Prasad (DW-2) did not state that the testator has signed the Will in his presence and in the presence of other attesting witness Basant Lal (DW-3). He had also omitted to state that other attesting witness has seen the testator signing or putting his mark on the Will.
25. From the aforesaid narration of facts, it is quite vivid that compliance of Section 63(c) of the Succession Act, 1925 is missing though strict compliance of the said provision is imperative. Defendants No.1 & 2 being propounders of the will must have

proved that the testator has signed the will in presence of the attesting witnesses and the attesting witnesses have also signed in presence of the testator. Section 63(c) of the Succession Act, 1925 clearly lays down the requirement of valid and enforceable will that it shall be attested by two or more witnesses, each of them has seen the testator signing or affixing his mark to the will and each of the witnesses has signed the will in presence of the testator as held by the Supreme Court in H. Venkatachala Iyengar (supra) that a will has to be proved like any other document except that evidence tendered in proof of will should additionally satisfy the requirement of Section 63 of the Succession Act, 1925 apart from under Section 68 of the Evidence Act, 1872.

26. Analysing the facts of the present case, it would appear that defendants No.1 & 2 – propounders of the will, have failed to prove the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of Evidence Act, 1872, as both the attesting witnesses Ambika Prasad (DW-2) & Basant Lal (DW-3) omitted to state that the testator signed the Will in their presence and the said witnesses marked their affix in presence of the testator.

27. It is well settled law that mere signing of a will as a witness would not per se amount to compliance of Section 63(c) of the Succession Act, 1925 as *animo attestandi* is absolutely missing. In the matter of Bhagat Ram v. Suresh⁹, it has been held that to be an attesting witness it is essential that the witness should have put his signature

⁹ (2003) 12 SCC 35

animo attestandi for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature.

28. Faced with this situation, Mr. Prafull Bharat, learned counsel appearing on behalf of defendants No.1 & 2, would rely upon a decision of the Supreme Court in the matter of Naresh Charan Das Gupta v. Paresh Charan Das Gupta and another¹⁰ and invited my attention to paragraph 12 of the report which states as under: -

“12. ... The learned Judges of the High Court were of the opinion that as the execution and attestation took place at one sitting at the residence of P.W. 1, where the testator and the witnesses had assembled by appointment, they must all of them have been present until the matter was finished, and as the witnesses were not cross-examined on the question of attestation, it could properly be inferred that there was due attestation. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. ...”

29. The Supreme Court in this case has held that where the testator and the witnesses had assembled by appointment, they must all of them have been present until the matter was finished, and as the witnesses were not cross-examined on the question of attestation, it could properly be inferred that there was due attestation.

30. In the instant case, it is not the case of the defendants that the testator and the attesting witnesses have assembled by appointment and therefore the testator has seen the two attesting witnesses signing the Will and the attesting witnesses signed the

10 AIR 1955 SC 363

Will in presence of the testator. Therefore, the decision of the Supreme Court in Naresh Charan Das Gupta (supra) is quite distinguishable.

31. Apart from this, in the instant case, the Will is also not free from doubt. The plaintiffs are daughters of Ramlal. The Will is said to have been read-over to the testator – Ramlal. In the Will it has been recorded / written by Ramlal that his daughters have no issue meaning thereby that Ramlal – testator of the Will had no grandson and grand-daughter, whereas it is apparent on record before this Court that on the death of original plaintiff No.1 Dulara Bai (daughter of Ramlal), her two sons and two daughters have been brought on record which raises doubt on the Will, as no person who is writing his last Will or last wish of his life would tell a lie and would sign a document making a declaration disowning his grandsons and grand-daughters, followed by the fact that the age of the testator in the Will Ex.P-1 is recorded as 75 years on 15-5-1992 and immediately thereafter, on 18-5-1992 / 26-5-1992, his age was recorded in Ex.P-2 as 65 years. Apart from this, firstly writing a Will on 15-5-1992 and immediately after eleven days, alienating the part of the suit property on 18-5-1992 / 26-5-1992 also cast doubt on the genuineness of the Will. Moreover, defendants No.1 & 2 have taken a prominent part in execution of Will which has conferred on them a substantial benefit, that itself is one of the suspicious circumstances for which no clinching evidence has been brought on record except saying that they have signed the Will and also performed the last rites of Ramlal and therefore out of love and

affection, he has executed the Will in their favour excluding his own two daughters / plaintiffs aged about 40+ years, which the propounders of the Will must have clarified on record as held by the Supreme Court in **Surendra Pal** (supra).

32. There is no evidence on record that deceased Ramlal was not having cordial relations with the two plaintiffs / his daughters. In this regard, the decision of the Supreme Court in the matter of **Jagdish Chand Sharma v. Narain Singh Saini (dead) Through Legal Representatives and others**¹¹ may be quoted profitably herein: -

“58. The materials on record, as a whole, also do not, in our comprehension, present a backdrop, in which, in normal circumstances, the testator would have preferred the appellant to be the legatee of his property as set out in the will, Ext. A-1, by denying his wife, children and grandchildren who were alive and with whom he did share a very warm affectionate and cordial relationship. Viewed in this context, the bequest is ex facie unnatural, unfair and improbable thus reflecting on the testator’s cognizant, free, objective and discerning state of mind at the time of the alleged dispensation. The suspicious circumstances attendant on the disposition, in our opinion, do militatively impact upon the inalienable imperatives of solemnity and authenticity of any bequest to be effected by a testamentary instrument.”

33. In light of the aforesaid observation, if the facts of the present case are examined, there is no evidence on record to hold that deceased Ramlal and the plaintiffs were not having cordial relations except saying that defendants No.1 & 2 were taking care of the illness of Ramlal and out of love and affection, he executed a Will in favour of defendants No.1 & 2. At this stage, it would also be appropriate to notice the pertinent observation noticed by the Privy Council in the

11 (2015) 8 SCC 615

matter of Motibai Hormusjee Kanga v. Jamsetjee Hormusjee Kanga¹² at p. 33:

“A man may act foolishly and even heartlessly ; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition.”

34. Thus, taking into consideration the facts and circumstances of the present case, this Court is satisfied that execution and attestation of Will said to have been executed by the testator in favour of defendants No.1 & 2 has not been proved in accordance with Section 63(c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872 and the Will also suffers from suspicious circumstances and cannot be said to be executed out of free will and in sound disposing mind.

35. So far as the right of Ramlal to execute Will of his undivided share in the coparcenary property, it is no longer res integra. The Supreme Court in the matter of Sham Lal alias Kuldip v. Sanjeev Kumar and others¹³ held that a male Hindu governed by Mitakshara system is not debarred from making a will in respect of coparcenary / ancestral property. Similar is the proposition laid down in the matter of Uttam v. Saubhag Singh and others¹⁴ in which Their Lordships of the Supreme Court observed as under: -

“18. ... The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarised as follows:-

(I) xxx xxx xxx.

(ii) To proposition (i), an exception is contained in

12 AIR 1924 PC 28

13 (2009) 12 SCC 454

14 (2016) 4 SCC 68

Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to [Section 6](#), which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) to (vi) xxx xxx xxx”

36. In view of the aforesaid analysis, the first appellate Court is absolutely unjustified in reversing the judgment & decree of the trial Court. Accordingly, judgment & decree passed by the first appellate Court is set aside and that of the trial Court is restored. The substantial question of law is answered accordingly.

37. The second appeal is allowed to the extent sketched herein-above leaving the parties to bear their own cost(s).

38. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge